

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAY 12 1997

In the Matter of )

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Federal Communications Commission  
Office of Secretary

Implementation of Infrastructure )  
Sharing Provisions in the )  
Telecommunications Act of 1996 )

CC Docket No. 96-237

**REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY  
TO  
OPPOSITION TO ITS PETITION FOR RECONSIDERATION AND CLARIFICATION**

Southwestern Bell Telephone Company ("SWBT") submits this Reply to the "Reply Comments" ("RTC Reply") of the Rural Telephone Coalition ("RTC") which addressed SWBT's request that the Commission reconsider that part of the Order<sup>1</sup> which makes incumbent local exchange carriers ("LECs") responsible for securing intellectual property ("IP") licenses necessary for qualifying carriers to share infrastructure.<sup>2</sup> The RTC Reply fails to address the legal issues identified by SWBT, and seeks to ignore or minimize the practical difficulties of that requirement. The Commission should grant reconsideration on this issue, and adopt SWBT's suggested alternative as the means by which qualifying carriers can obtain any necessary IP licenses.<sup>3</sup>

In light of the RTC Reply's characterizations of SWBT's position on IP licensing, SWBT

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<sup>1</sup> *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-237, Report and Order, FCC 97-36 (February 8, 1997) ("Order").

<sup>2</sup> See SWBT's "Petition for Reconsideration and Clarification" filed on April 3, 1997 ("Petition"). Reconsideration on this same issue was also sought by BellSouth Corporation, GTE Service Corporation, and Octel Communications Corporation. See "BellSouth Petition for Reconsideration," "Petition for Reconsideration of GTE Service Corporation," and Octel's "Petition for Limited Reconsideration," each filed in CC Docket No. 96-237 on April 3, 1997.

<sup>3</sup> See Petition, pp. 6, 7.

feels it again must again clarify the fundamental basis for its position. Embedded in SWBT's operations is intellectual property, the vast majority of which is licensed from third parties. Those licenses limit SWBT's use and disclosure of the IP, and the terms and conditions of the licenses vary. Neither the Telecommunications Act of 1996 ("Act") in general nor Section 259 in particular voided those licenses, or otherwise permit SWBT to ignore their limitations, terms or conditions. To the extent that a sharing request involves IP, rights to the IP may need to be obtained from the IP holder to permit the sharing. It is entirely possible for a particular sharing arrangement that no additional licensing would be needed; however, this is a determination that will need to be made in light of a factually specific request and the IP license implicated. SWBT's IP positions are further explained in "Comments of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell," filed April 15, 1997, and "Reply Comments of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell," filed May 6, 1997, in *Petition of MCI for Declaratory Ruling*, File No. CCBPol 97-4, CC Docket No. 96-98, which are hereby incorporated into this Reply.

Various reasons compel the conclusion that the qualifying carrier should be required to procure its own licenses when necessary.<sup>4</sup> RTC does not rebut those reasons directly, but seeks to minimize the requirement imposed by the Order by characterizing it as "articulat[ing] the need for a reasonable level of cooperation with respect to the licensing needs" of the qualifying carriers.<sup>5</sup>

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<sup>4</sup> Id., pp. 2-5.

<sup>5</sup> RTC Reply, p. 5.

Later, RTC describes the obligation of sharing incumbent LECs as requiring “a [sharing LEC] at least to approach the third party licensee” for favorable terms for a license extension, concluding “[t]hat is all the Commission requires here.”<sup>6</sup> In fact, depending upon the factual situation, SWBT’s confidentiality obligations, and where practical, SWBT contemplates that it will often be willing to voluntarily engage in those types of activities with respect to qualifying carriers. SWBT does not believe, however, that the Order can be so narrowly read, and the requirement so minimized.

The Commission has instead directed sharing incumbent LECs “to seek, to obtain, and to provide necessary licensing” where necessary. Order, para. 69. This does not involve a question of the Commission’s authority “to involve” sharing LECs in the process of obtaining licenses.<sup>7</sup> Rather, the Commission is requiring sharing LECs to obtain something not already possessed so that it can be “shared” with a qualifying carrier, and to do so in a manner satisfactory for the qualifying carrier’s needs and plans. As argued in SWBT’s Petition, imposing the requirement is beyond the Commission’s authority and, contrary to the RTC Reply, is economically unreasonable and contrary to the public interest.<sup>8</sup> For those reasons as well as the other legal and practical reasons set forth in the Petition (most of which were not addressed or rebutted by RTC), the Commission should reconsider this aspect of its Order.

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<sup>6</sup> Id., p. 6.

<sup>7</sup> Id.

<sup>8</sup> Id.

RTC's claims addressing the relative negotiating positions of sharing incumbent LECs and qualifying carriers are based upon fallacies and naked conclusions. For example, RTC asserts that an IP holder

would also be far more likely to extend favorable big-customer arrangements to include a sharing arrangement than it would be to grant equally favorable terms, conditions, and prices for a small, stand-alone licensing arrangement negotiated by a relative market bit-player.<sup>9</sup>

The first fallacy is that the sharing LEC will be large "big-customer" LEC. Under the Order, any size incumbent LECs can be sharing LEC. Secondly, this argument also assumes that the qualifying carrier will be a "relative market bit-player." As SWBT's Petition pointed out, the qualifying carrier could be any number of multinational carriers, including AT&T.<sup>10</sup>

Fundamentally, that RTC assertion presumes that an IP holder will be pre-disposed to provide the sharing incumbent LEC more favorable terms for a license sought for the benefit for the third party than the IP holder would give to the third party itself. No support whatsoever is provided for that assertion, and SWBT cannot conceive of any. When a new license is needed in order to engage in infrastructure sharing, SWBT fully anticipates that the identity of the qualifying carrier will be known to the IP holder for the reasons stated in SWBT's Petition.<sup>11</sup> There is no basis

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<sup>9</sup> Id.

<sup>10</sup> Petition, p. 4.

<sup>11</sup> Petition, p. 5 (discussion of need for privity, warranties, indemnities, limitations of liability).

for assuming that the IP holder will give the qualifying carrier more favorable terms just because the providing LEC may somehow be involved. SWBT does not understand why RTC believes that an IP holder would believe its favorable treatment of a third party would cause the sharing incumbent LEC to view the holder favorably. IP holders certainly have given no such indication. Instead, IP holders have indicated in another Commission proceeding their willingness to negotiate reasonable IP licenses directly with requesting carriers under Section 251.<sup>12</sup> There is no economic, business, or legal reason to expect that IP holders will treat Section 259 qualifying carriers differently than Section 251 requesting carriers.

Finally, the RTC Reply contains an argument that seems to suggest that a sharing incumbent LEC's purchasing and negotiating abilities are economies of scales and scope that should be made available to qualifying carriers.<sup>13</sup> There is no basis in the Act or Section 259 for such a conclusion.

Again, Section 259 contemplates sharing of existing "infrastructure, technology, information, facilities, or functions," not using the sharing incumbent LEC as a proxy to procure such items for a qualifying carrier's use. With infrastructure sharing, qualifying carriers are able to take advantage

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<sup>12</sup> See "Comments of Lucent Technologies Inc." at page 6 and "Comments of Northern Telecom Inc." at page 7, both filed April 15, 1997, in *Petition of MCI for Declaratory Ruling*, File No. CCBPol 97-4, CC Docket No. 96-98, which are hereby incorporated into this Reply.

<sup>13</sup> RTC Reply, pp. 5, 6.

of the economies of scale and scope realized by sharing LECs, not force them to "realize" unneeded relationships.

Respectfully submitted,

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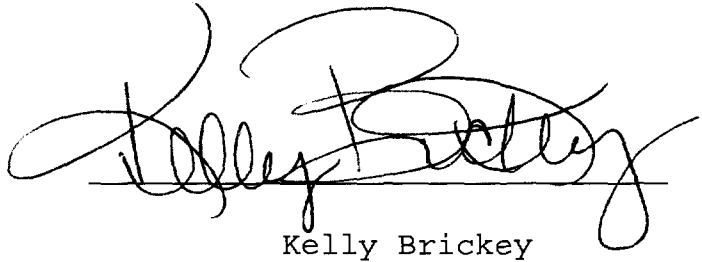
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CERTIFICATE OF SERVICE

I, Kelly Brickey, hereby certify that the foregoing, "REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY" in Docket No. 96-237 has been filed this 12th day of May, 1997 to the Parties of Record.

A handwritten signature in black ink, appearing to read 'Kelly Brickey', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.

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